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FMC Agreement No. 20111-001

FIRST AMENDMENT TO
DAILY PASSENGER CRUISE WHARFAGE AGREEMENT
BETWEEN
BROWARD COUNTY
AND
SEAESCAPE ENTERTAINMENT, INC.



FIRST AMENDMENT TO
DAILY PASSENGER CRUISE WHARFAGE AGREEMENT
BETWEEN
BROWARD COUNTY
AND
SEAESCAPE ENTERTAINMENT, INC.,

This First Amendment to Daily Passenger Cruise Wharfage Agreement made and entered into by and between BROWARD COUNTY, a political subdivision of the State of Florida, its successors and assigns, hereinafter referred to as "COUNTY", through its Board of County Commissioners, and SEAESCAPE ENTERTAINMENT, INC., a Florida corporation, hereinafter referred to as "SEAESCAPE."

WITNESSETH:

WHEREAS, COUNTY and SEAESCAPE entered into a Daily Passenger Cruise Wharfage Agreement dated October 3, 2000 ("Agreement"); and

WHEREAS, the Parties hereto desire to amend said Agreement to provide for an additional daily vessel service, i.e., ferry service, which complements the existing SEAESCAPE service and will utilize the same existing passenger berth and related Port and terminal facilities as SEAESCAPE, thereby creating additional revenues for Broward County realized from the dual utilization of the SEAESCAPE berth and related passenger terminal facilities; and

WHEREAS, the Parties hereto desire to effectuate additional changes to the Agreement as provided herein;

NOW, THEREFORE, in consideration of the mutual terms and conditions, promises, covenants and payments herein set forth, the Parties hereto agree to amend the Agreement as follows:

1. The foregoing recitals are true and correct and incorporated herein by reference.

2. Section 2, entitled SERVICES TO BE PROVIDED BY SEAESCAPE, is hereby amended to read as follows:

SEAESCAPE agrees to conduct daily passenger cruise services (as defined in the "Tariff") pursuant to the terms and conditions provided herein from the Port, with a vessel operated for and marketed by SEAESCAPE and may participate in the deployment of the Bahamas Florida Express ("BFE") ferry service between Port and the Commonwealth of the Bahamas. Such cruise and ferry services will be conducted by SEAESCAPE in conformance with the following standards and characteristics consistent with those utilized in its current operations at the Port, to wit:

SEAESCAPE's currently operates the vessel known as the M/V Island Adventure, ~~shall continue~~ The BFE vessel to be deployed from the Port is known as the "THE CAT." The BFE vessel shall be deployed from the SEAESCAPE facilities provided by COUNTY to SEAESCAPE as described in Section 4 herein.

Any substitute vessel(s) must have similar or lesser physical characteristics as the M/V Island Adventure with respect to overall length (~~not to exceed the M/V Island Adventure and side port operational facilities~~). In no event shall a substitute vessel for either the M/V Island Adventure or THE CAT exceed 520 feet in length. Prior written approval from the Port Department is required before ~~any a~~ a substitute vessel ~~is utilized in SEAESCAPE's operation~~ for either the M/V Island Adventure or THE CAT is deployed at the Port, which approval shall not be unreasonably ~~denied~~ withheld.

SEAESCAPE shall adhere to the sailing schedule attached hereto as Exhibit "A," and made a part hereof. Notice of any proposed changes to said sailing schedule made by SEAESCAPE shall be provided in writing to the Port Department within fourteen (14)

calendar days prior to such proposed changes being implemented. Port Department, in order to facilitate navigation and commerce at the Port, reserves the right to reject SEAESCAPE's proposed sailing schedule changes and require SEAESCAPE to adhere to the sailing schedule attached hereto as Exhibit "A." Any proposed changes to the sailing schedule which are accepted by the Port Department shall be made a part of Exhibit "A" by an amendment to same which the Port Department is authorized to effectuate.

It is anticipated that THE CAT will commence sailing from Port on or about November 1, 2003; the actual date of its first sailing will be known as the "Deployment Date." SEAESCAPE shall cause the BFE vessel to adhere to its daily sailing schedule attached hereto as Exhibit "B" and made a part hereof. Notice of any proposed changes to said sailing schedule shall be provided in writing to the Port Department within fourteen calendar (14) days prior to such proposed changes being implemented. Port Department, in order to facilitate navigation and commerce at the Port, reserves the right to reject proposed sailing schedule changes and require SEAESCAPE to ensure that the BFE vessel adheres to the sailing schedule attached hereto as Exhibit "B." Any proposed changes to the sailing schedule which are accepted by the Port Department shall be made a part of Exhibit "B" by an amendment to same which the Port Department is authorized to effectuate.

3. Section 4, entitled FACILITIES, is hereby amended to read as follows:

A. COUNTY shall provide SEAESCAPE, for the operation of its daily passenger cruise services and operation of the BFE vessel, as contemplated by the terms of this Agreement, berthing and related terminal facilities (for a vessels) as

described in Section 2 hereinabove), which the Port Department deems necessary in order to facilitate navigation and commerce, and ~~protection~~ of vessels and property at Port Everglades. Notwithstanding, the Port Department shall have the right over the Term of this Agreement, to assign other Port users such berthing and related terminal facilities as it deems necessary to support and facilitate navigation and commerce, which may include berthing and related terminal facilities which are utilized by SEAESCAPE in the conduct of its daily cruise services and the deployment of the BFE ferry vessel hereunder. Furthermore, the passenger berths and the related port and terminal facilities shall be maintained by the COUNTY. COUNTY shall observe and obey, and require their employees, guests, invitees and those doing business with them, to observe and obey all applicable laws, regulations, rules and other legal requirements including, without limitation, the Americans with Disabilities Act.

...

4. Section 5, entitled PASSENGER WHARFAGE RATE is hereby amended to read as follows:

A. During the Term of this Agreement, SEAESCAPE shall pay to COUNTY daily passenger wharfage charges (per each passenger move) as follows:

...

B. SEAESCAPE shall pay to COUNTY for so long as the BFE ferry vessel is deployed from Port as contemplated by the terms and conditions of this Agreement, passenger wharfage charges (per each BFE passenger move) at the published Tariff passenger wharfage rate.

NOTE: Passenger move means a person embarking/disembarking or in transit on a SEAESCAPE or BFE vessel.

5. Section 6, entitled PORT CHARGES is hereby amended to read as follows:

A. During the Term of this Agreement, except as otherwise provided ~~in this Agreement~~ herein, SEAESCAPE shall pay to COUNTY for the SEAESCAPE vessel, Dockage at the Tariff rate equivalent to that of a vessel of 15,000 Gross Registered Tons (GRT) or the actual size of the vessel in operation, whichever is greater, and all other Port charges at their respective published Tariff rates, as such Tariff rates may be amended by COUNTY.

B. During the Term of this Agreement, except as otherwise provided herein, SEAESCAPE shall pay to COUNTY for the BFE vessel, Dockage at the Tariff rate equivalent to that of a vessel of 6,556 Gross Registered Tons (GRT) or the actual GRT of the BFE vessel (as provided in Lloyd's Register of Ships) in operation at Port, whichever is greater, and all other Port charges at their respective published Tariff rates, as such Tariff rates may be amended by COUNTY.

C. During the Term of this Agreement, SEAESCAPE shall pay to COUNTY all cargo wharfage charges incurred in connection with its and BFE's vessel cargo loading and discharge operations at published Tariff rates, as such Tariff rates may be amended by COUNTY.

6. Section 7, entitled ANNUAL MINIMUM GUARANTEE AND ADDITIONAL ANNUAL MINIMUM GUARANTEE OF PASSENGER WHARFAGE is hereby amended to read as follows:

A. ...

Except as otherwise provided herein, within thirty (30) calendar days following the completion of each Contract Year of this Agreement, SEAESCAPE shall pay to COUNTY an amount equal to the shortfall if any, between the AMG of passenger wharfage and the actual passenger wharfage amount paid by SEAESCAPE for said period utilizing the published Tariff passenger wharfage rates, ~~set forth in Section Five herein.~~

B. Beginning on the Deployment Date, as said date is defined and used in Section Two herein, SEAESCAPE shall pay to COUNTY in addition to the AMG provided hereinabove in Section 7A, the Additional Annual Minimum Guarantee ("AAMG") of passenger wharfage utilizing the published Tariff passenger wharfage rates as follows:

- i. Deployment Date of THE CAT through September 30, 2004 (Contract Year 4), a minimum of 150,000 passenger movements.
- ii. October 1, 2004 through September 30, 2005 (Contract Year 5), a minimum of 214,000 passenger movements.
- iii. October 1, 2005 through September 30, 2006 (Contract Year 6), a minimum of 226,000 passenger movements.
- iv. October 1, 2006 through September 30, 2007 (Contract Year 7), a minimum of 239,000 passenger movements.
- v. October 1, 2007 through September 30, 2008 (Contract Year 8), a minimum of 251,000 passenger movements.
- vi. October 1, 2008 through September 30, 2009 (Contract Year 9), a minimum of 264,000 passenger movements.

vii. October 1, 2009 through September 30, 2010 (Contract Year 10), a minimum of 277,000 passenger movements.

C. Except as provided herein, within thirty (30) calendar days following the completion of each Contract Year of this Agreement, SEAESCAPE shall pay to COUNTY an amount equal to the shortfall if any, between the AAMG of passenger wharfage and the actual additional annual passenger wharfage amount paid by SEAESCAPE that was attributable to the BFE vessel for said period, utilizing the published Tariff passenger wharfage rates. In the event the deployment of the BFE vessel is terminated as provided herein prior to the conclusion of a Contract Year, then the adjusted AMG calculation, (as provided in Subsection F. hereinbelow), shall be pro-rated monthly up to the BFE Termination Date (as defined in Subsection E. below), in the applicable Contract Year. As well, the AAMG shortfall if any, shall be calculated pro rata on a monthly basis up to the BFE Termination Date (in the applicable Contract Year). SEAESCAPE shall pay COUNTY the AAMG shortfall, if any, within thirty (30) calendar days from the BFE Termination Date.

B-D. Notwithstanding the schedules for AMG, AAMG and Passenger Wharfage Rates herein provided, the Parties hereto agree to meet and renegotiate within ninety (90) days prior to expiration of Contract Year 6, the AMG schedule, AAMG and Passenger Wharfage Rates schedules for Contract Years 7 through 10. The newly negotiated schedule for Passenger Wharfage Rates shall not contain Tariff rates less than those stated herein. Upon successful conclusion of negotiations, this Agreement shall be amended as provided herein, to reflect the revised AMG, AAMG and Passenger Wharfage Rates schedules for Contract Years 7 through 10. If such

negotiations are not successfully concluded by the parties hereto, the AMG, AAMG and passenger wharfage rates schedules shall remain at their then existing Agreement levels.

E. SEAESCAPE shall use its best efforts to provide Port Department with sixty (60) calendar days' prior written notice of its intent to discontinue and terminate its cooperative joint marketing and operational efforts with BFE as contemplated by the terms and conditions of this Agreement resulting in the withdrawal and cessation of the BFE's service from Port ("Bahamas Termination Notice"). Where available to it, SEAESCAPE shall specify the date and time of the last sailing of the BFE vessel in the Bahamas Termination Notice. Effective on the earlier of: i) the date of the last BFE vessel sailing from Port as provided in the Bahamas Termination Notice or, ii) the actual date the BFE vessel ceases to operate out of Port as contemplated by the terms and conditions of this Agreement (the "BFE Termination Date") (regardless of the reason for such termination), SEAESCAPE's AAMG payment, Dockage payment obligations and other Tariff charges and payment requirements herein relating to the deployment of the BFE vessel, shall cease. In the event that SEAESCAPE does not provide a Bahamas Termination Notice, the BFE Termination Date will be deemed to be sixty (60) calendar days following the last sailing of the BFE vessel from the Port. If the Bahamas Termination Notice provides less than sixty days' prior notice of the last sailing of the BFE vessel from the Port, then the BFE Termination Date will be sixty (60) days from the date of the Bahamas Termination Notice. Notwithstanding BFE's termination of service from Port, SEAESCAPE's subsequent (post BFE termination) AMG payment obligations (not to be adjusted by 75% of the AAMG for a corresponding Contract Year,

except to the extent that an adjustment based on a pro-rated Contract Year is appropriate), Dockage payment obligations and other Tariff charges and payment obligations provided herein including payment of a prior AAMG shortfall (for a given Contract Year or portion thereof), shall remain in full force and effect.

In the event, the BFE vessel for any reason ceases to be deployed from Port as contemplated by the terms and condition of this Agreement, SEAESCAPE shall pay COUNTY within thirty (30) calendar days following the BFE Termination Date, the shortfall, if any, between the sixty (60) days AAMG utilizing the applicable Contract Year AAMG schedule and the actual passenger wharfage pertaining to the BFE service paid for the sixty (60) day period immediately preceding the BFE Termination Date, in addition to all other Tariff charges and other payments required to be made hereunder as they pertain to the BFE service and that may then be outstanding.

F. Notwithstanding anything set forth herein to the contrary, it is agreed and understood that in calculating the AMG for a given Contract Year, SEAESCAPE will be credited by COUNTY with 75% of the AAMG for the corresponding Contract Year for so long as the BFE vessel is deployed from the Port, as provided under the terms and conditions of this Agreement. For example:

Contract Year 4 - AMG before adjustment = 720,000 passenger movements

Contract Year 4 - 75% of AAMG of 150,000 = 112,500 passenger movements

Contract Year 4 – Adjusted AMG = 607,500 passenger movements

7. Section 8, entitled COMPLIANCE WITH GOVERNMENTAL LAWS; TARIFFS; RULES; REGULATIONS AND POLICIES, is hereby amended to read as follows:

Except as otherwise expressly provided for herein, in making use of facilities and services provided by COUNTY, and SEAESCAPE shall be bound by and adhere to the rules and regulations, and pay the applicable rates contained in the Tariff, any amendments thereto or reissues thereof, provided that such rules, regulations, and rates are imposed and shall be applied uniformly to all similarly situated Port users. SEAESCAPE at its expense, shall comply and cause the BFE operator to comply with all applicable laws, ordinances, rules, regulations, and directions of the federal, state, county and municipal governmental units or agencies having jurisdiction over the passenger cruise or ferry vessel business being conducted by SEAESCAPE or in cooperation with SEAESCAPE hereunder. SEAESCAPE shall be obligated; (i) to observe and obey, and to require its employees, guests, invitees and those doing business with it, to observe and obey such reasonable rules and regulations of Broward County (including amendments and supplements thereto) governing the conduct and operations of SEAESCAPE and BFE as may from time to time be promulgated; (ii) to pay all license and permit fees and charges for the conduct of its business before such amounts become delinquent; and (iii) subject to COUNTY's obligations under Section Four herein, to maintain COUNTY property in a clean, orderly and safe condition so as to avoid injury to persons and property.

8. Section 13, entitled VEHICULAR PARKING RATES AND USE, is hereby amended to read as follows:

Parking rates for all daily cruise ship passengers shall be in accordance with the Tariff. All available parking spaces shall be subject to reasonable rules and regulations imposed by COUNTY. SEAESCAPE and the passengers of the SEAESCAPE vessel

and BFE vessel shall continue to have access to parking facilities consistent with the practices employed in the current operations at the Port.

9. Section 17, entitled INDEMNIFICATION OF COUNTY, is hereby amended to read as follows:

SEAESCAPE shall at all times hereafter, and except for any negligent act of COUNTY or its employees, indemnify, hold harmless and at County Attorney's option, defend or pay for an attorney selected by County Attorney and consented to by SEAESCAPE as provided for herein, to defend COUNTY, its officers, agents, servants, and employees against any and all claims, losses, liabilities, and expenditures of any kind, including attorney fees, court costs, and expenses, caused by negligent act or omission of SEAESCAPE or its employees, agents, servants, or officers, or, accruing, resulting from, or related to the subject matter of this Agreement or, accruing, resulting from, or related to the vessel operations of BFE from Port, or arising from an intentional or negligent act or omission of SEAESCAPE or, arising from an intentional or negligent act or omission from the vessel operations of BFE from Port, including, without limitation, any and all claims, demands or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property.

...

10. Section 19, entitled LICENSE; PERMITS; TAXES, is hereby amended to read as follows:

A. SEAESCAPE agrees to obtain and to cause BFE operator to obtain and keep in full force and effect all licenses, permits, and authorizations required by any governmental authority, body, or agency having jurisdiction or regulatory power over the

vessels operated for and marketed by SEAESCAPE that is are subject to the provisions of this Agreement.

B. SEAESCAPE agrees to pay any and all taxes that may be levied on rights or interests granted to ~~them~~ it hereunder and on any of ~~their~~ its or BFE's improvements and tangible personal property situated on COUNTY owned land(s) subject to taxation and intangible personal property subject to taxation in Broward County, Florida.

...

11. Section 29, entitled INSURANCE, is hereby amended to read as follows:

SEAESCAPE, for its own vessel operations, shall ~~cause to provide~~ at its own expense and keep in continuous force and effect, and shall cause BFE operator for its own vessel operations, to provide at its own expense and keep in continuous force and effect commencing no later than the Deployment Date: (i) Protection and Indemnity insurance to include such coverages with a minimum limit of Ten Million Dollars (\$10,000,000) and be placed with such insurers as is customary for luxury cruise ship operators; (ii) with respect to the passenger cruise activities of SEAESCAPE and BFE for its ferry vessel operations and ~~its~~ their respective employees, contractors, agents, customers and guests in and around the Port, Comprehensive General or Commercial Liability insurance with minimum limits of One Million Dollars (\$1,000,000) per occurrence for personal injuries and property damage liability, including for premises/operations and independent contractors; (iii) Business Automobile Liability in the minimum amount of Five Hundred Thousand Dollars (\$500,000) per occurrence bodily injury and property damage liability for all owned, non-owned and hired autos operating in or out of the Port; and (iv) Worker's Compensation insurance in an amount

not less than One Hundred Thousand Dollars (\$100,000) for each accident in compliance with Florida Statutes Chapter 440, and including United States Longshore and Harbor Workers Compensation Act, Jones Act and coverages, and Maritime Coverages Endorsement, as required by applicable federal and state laws.

...

12. Section 30, entitled ENVIRONMENTAL IMPAIRMENT; CONTAINMENT AND REMOVAL, is hereby amended to read as follows:

...

B. The discharge of any Pollutants in the Port in violation of any federal, state or local law, rule or regulation or in violation of an order or directive of any federal, state, or local court or entity is prohibited. Any such discharge by SEAESCAPE its officers, employees, contractors, subcontractors, invitees, or agents, whether committed prior to or subsequent to the date of execution of this Agreement, shall be at SEAESCAPE's expense and, upon demand of COUNTY, immediately contained, removed and abated to the satisfaction of COUNTY and any court or regulatory entity having jurisdiction of the discharge. For the purposes of this Section, the BFE operator shall be considered a SEAESCAPE invitee. If SEAESCAPE does not take action immediately to have such Pollutants contained, removed and abated, COUNTY may undertake the removal of the discharge, however, any such action by COUNTY shall not relieve SEAESCAPE of its obligations under this or any other provision of this Agreement or as imposed by law. No action taken by either SEAESCAPE or COUNTY to contain or remove Pollutants, or to abate a discharge, whether such action is taken voluntarily or not, shall be construed

as an admission of liability as to the source of or the person who caused the pollution or its discharge.

...

13. Section 32, entitled RELATIONSHIP OF PARTIES/NO THIRD PARTY BENEFICIARIES, is hereby amended to read as follows:

...

SEAESCAPE is an independent contractor under this Agreement. Services provided by SEAESCAPE and the BFE operator, shall be subject to the supervision of SEAESCAPE. In providing any services, SEAESCAPE, the BFE operator and their respective, ~~or its~~ agents shall not be acting and shall not be deemed as acting as officers, employees, or agents of the COUNTY. The Parties expressly acknowledge that it is not their intent to create any rights or obligations in any third person or entity, other than the rights, duties and obligations conferred upon the Parties under this Agreement. Therefore, the Parties agree that, other than the rights, duties and obligations conferred upon COUNTY and SEAESCAPE, there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against either of them based upon this Agreement.

14. Section 36, entitled PORT SECURITY, is hereby amended to read as follows:

SEAESCAPE shall be responsible and cause the BFE operator to be responsible for compliance with federal, state and local laws and regulations, and such laws and regulations as may be imposed from time-to-time by the U.S. Coast Guard, U.S. Customs Service or other federal agencies, and by COUNTY, with respect to passenger security, drug interdiction, and other import and export controls.

15. Section 39, entitled SECURITY DEPOSIT, is hereby added to read as follows:

A. SEAESCAPE shall provide COUNTY with a Two Hundred Fifty Thousand Dollar (\$250,000.00) letter of credit ("Security Deposit") as a security deposit as soon as practical following the date of COUNTY's execution of this First Amendment to Agreement, but in no event later than two weeks from the date the COUNTY approves this First Amendment to Agreement.

B. COUNTY shall have the right to use the Security Deposit as a guarantee of SEAESCAPE's payment of Port charges that arise in connection with this Agreement, such as AMG and AAMG payments; dockage; wharfage; cargo fees; line handlers' fees; water; property damage; and harbormaster's fees. Prior to making written demand for application of all or any portion of the Security Deposit, COUNTY will comply with the notice and cure provisions set forth in Section 20 of this Agreement. All or any part of the Security Deposit applied by COUNTY under this Section shall be repaid by SEAESCAPE within fifteen (15) calendar days after written demand therefor is sent so that the Security Deposit is maintained at its original agreed amount provided in Subsection (A) hereinabove. All amounts not paid within said time frame shall accrue interest and late charges as provided in the Tariff, all amendments and reissues thereof.

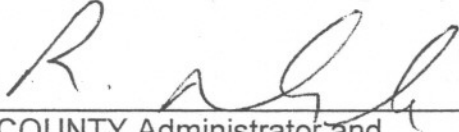
C. SEAESCAPE may, from time to time, request permission to substitute other comparable forms of security for the Security Deposit, which request will not be unreasonably denied.

16. Except as modified herein, the terms and conditions of the Agreement between the Parties shall remain in full force and effect.

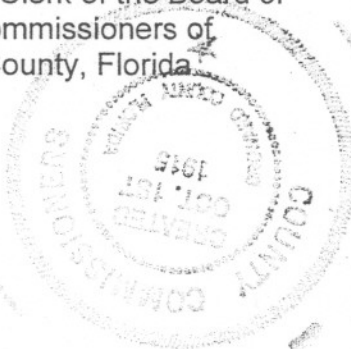
IN WITNESS WHEREOF, the Parties hereto have made and executed this First Amendment to Agreement on the respective dates under each signature: BROWARD COUNTY through its BOARD OF COUNTY COMMISSIONERS, signing by and through its Mayor or Vice Mayor, authorized to execute same by Board action on the ____ day of _____, 2003, and SEAESCAPE ENTERTAINMENT, INC., signing by and through its _____, duly authorized to execute same.

COUNTY


ATTEST:



COUNTY Administrator and
Ex-Officio Clerk of the Board of
County Commissioners of
Broward County, Florida



BROWARD COUNTY, through its
BOARD OF COUNTY COMMISSIONERS

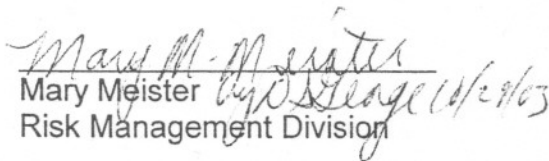
By 

DIANA WASSERMAN-RUBIN, Mayor

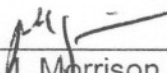
4th day of November, 2003

Approved as to form by
Office of County Attorney
Broward County, Florida
Edward A. Dion, County Attorney
Broward County's Port Everglades Dept.
1850 Eller Drive, Suite 502
Fort Lauderdale, Florida 33316
Telephone: (954) 523-3404
Telecopier: (954) 523-2613

Reviewed and approved by



Mary Meister
Risk Management Division

By 

Russell D. Morrison
Assistant County Attorney

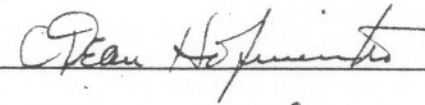
FIRST AMENDMENT TO DAILY PASSENGER CRUISE WHARFAGE AGREEMENT
BETWEEN BROWARD COUNTY AND SEAESCAPE ENTERTAINMENT, INC.

SEAESCAPE ENTERTAINMENT, INC., a
Florida corporation,

ATTEST:


Corporate Secretary

(CORPORATE SEAL)

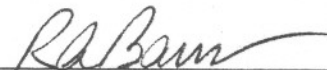
By 

C. DEAN HOFMEISTER, CHAIR
(Print Name and Title)

22 day SEPT, 2003.

Telephone: (954) 453-2200
Telecopier: (954) 453-6556

WITNESSES:


Signature



Signature

Exhibit "B"

Sailing Schedule of
THE CAT

From Terminal 1, Port Everglades

DAILY

ARIVE

DEPART

1200 hours

1600 hours